COASTAL STATES ENERGY CO.

IBLA 83-982 Decided May 4, 1984

Appeal from decision of Utah State Office, Bureau of Land Management, setting the royalty rate for competitive coal lease. U-28297.

Appeal dismissed.

1. Appeals--Coal Leases and Permits: Leases--Coal Leases and Permits: Royalties--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing-- Rules of Practice: Protests

   The conclusion of proceedings under the Freedom of Information Act, as amended, 5 U.S.C. § 552 (1982), to acquire information related to the rationale for the production royalty set in a competitive coal lease does not constitute a final decision by BLM subject to an appeal to the Board, challenging the royalty. The appellant only had a right to protest the royalty set in the notice of the lease sale and to appeal from any denial of that protest.

2. Coal Leases and Permits: Leases--Coal Leases and Permits: Royalties--Estoppel

   The Department is not estopped to dismiss an appeal challenging the production royalty set in a competitive coal lease, where the appellant failed to protest the notice of the lease sale, by virtue of the Department's subsequent refusal to provide information essential to determining the validity of the challenged royalty.

APPEARANCES: Kent W. Winterholler, Esq., James M. Elegante, Esq., Susan R. Poulter, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; K. L. McIff, Esq., Richfield, Utah, for Unelco, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Coastal States Energy Company (Coastal States) has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), setting the royalty rate for competitive coal lease, U-28297.

On October 1, 1974, appellant filed an application for a coal lease. By order dated June 14, 1978, the District Court for the District of Columbia, which had previously enjoined the issuance of coal leases, specifically authorized the issuance of a lease for coal contained in the Upper Hiawatha coal seam in the tract designated as U-28297. See NRDC v. Hughes, 454 F. Supp. 148, 151 (D.D.C. 1978). Notice that the lease was offered for sale by sealed bids was subsequently published in the Federal Register. 43 FR 42820 (Sept. 21, 1978). This notice provided that, on October 2, 1978, sealed bids submitted by prospective lessees would be opened and the highest bid announced. In addition, the notice stated that a detailed statement of the terms and conditions of the proposed lease was available at the Utah State Office, BLM, in accordance with 43 CFR 3422.2(b). The detailed statement on file in the Utah State Office provided, at pages 3-4, that: "A lease issued as a result of this offer will provide for payment of * * * a royalty payable to the United States at the rate of 11.68 percent of the value of coal mined by underground methods * * * but not less than $2.10 per ton of 2,000 pounds * * *."

Appellant filed a sealed bid and was declared the high bidder for coal lease U-28297. On December 20, 1978, the State Director, Utah State Office, BLM, executed competitive coal lease U-28297, with effective date January 1, 1979. This lease provided appellant the right to mine coal from the Upper Hiawatha coal seam in 2,631.98 acres of land in Sevier County, Utah. The lease further provided for a production royalty of 11.68 percent of the value of coal produced by underground mining methods, but not less than $2.10 per ton.

By notice in the Federal Register dated February 2, 1979, BLM requested public comments regarding two alternate methods for setting the minimum bonus bids and royalty rates for subsequent competitive Federal coal leases. See 44 FR 7237 (Feb. 6, 1979). One method contemplated was the use of a minimum bonus bid of $25 per acre and a corresponding royalty rate (the method employed at the time of the notice). The other method proposed the use of the minimum royalty rate required by law (8 percent for underground mines) and a corresponding bonus bid. By letter dated February 21, 1979, appellant submitted its comments, contending that the proposed change "falls short of being any significant improvement." In addition, appellant noted that royalty rates in "recent sales" had been "excessive," citing coal lease U-28297. By letter dated October 31, 1979, appellant submitted additional comments, again citing coal lease U-28297 as a case with an excessive royalty rate. Appellant recommended that, with respect to "recent and future coal leases," BLM should fully disclose the details of its fair market value determinations and solicit public comments, which would be considered in part in "revis[ing] existing royalty rates."

In its statement of reasons for appeal, at pages 11-12, appellant continues the history which led up to the present appeal:

> By letter dated July 2, 1980, following a number of lease awards after lease U-28297 wherein the royalty required was substantially less than the royalty contained in U-28297, Coastal States formally commenced a request for information under the FOIA [Freedom of Information Act, as amended, 5 U.S.C. § 552

(1976)] concerning the method by which 11.68% royalty rate in lease U-28297 was determined and set. See Record at 298. This letter followed a lengthy period of oral contact and negotiation over the information requested in the letter. See Record at 293-97. [1/] On March 19, 1981, Coastal States filed a FOIA lawsuit in the United States District Court for the Southern District of Texas, Houston Division. See Complaint, Record at 301. This filing was commenced because Interior had not satisfactorily responded to requests by Coastal States for information necessary in order for Coastal States to determine whether or not there had been a violation of law in setting the royalty rate in lease U-28297. See Record at 300. This suit resulted in the entry of an order by the United States District Court for the Southern District of Texas on February 24, 1983, ordering Interior to produce for Coastal States almost all documents pertaining to U-28297. Record at 322.

On August 26, 1983, appellant filed a notice of appeal from the BLM decision setting the 11.68 percent royalty rate for competitive coal lease U-28297. The primary question before the Board is whether the appeal was timely, giving this Board jurisdiction to consider this appeal. In order for this Board to have jurisdiction, a notice of appeal must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing. 43 CFR 4.411(a). No extensions of time will be granted for filing notice of appeal. 43 CFR 4.411(b). The question of the timeliness of appellant's appeal has been adequately briefed by both appellant and BLM. 2/

Appellant contends that the actions of BLM in setting the royalty rate for coal lease U-28297 had not culminated in a final decision which was subject to appeal until the conclusion of the FOIA proceedings. Appellant asserts that those proceedings culminated in a July 29, 1983, letter to appellant from BLM, which states that BLM had been unable to find one document, a computer printout, which the Department had been required to provide to appellant by court order in Coastal States Energy Co. v. United States Department of the Interior, Civ. No. H-81-621 (S.D. Texas). Appellant states that until it had finally obtained all of the requested information available, it was unable to determine whether the royalty rate was improper or "whether there were avenues of relief within the agency." Thus, appellant concludes

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1/ The reference to the record, which is included in exhibit B attached to appellant's statement of reasons, is to the letters dated Feb. 21, 1979, and Oct. 31, 1979, discussed, supra. In addition, in its July 1980 letter, appellant stated that "[f]or several weeks we have informally communicated with your office by telephone * * * in attempting to obtain copies of the above referenced materials," i.e., fair market value documents related to coal lease U-28297. There was no specific request for documents related to coal lease U-28297 in either the February or October 1979 letters.

2/ Unelco, Inc., a Utah corporation, and others have filed a document in which they reserve the right to intervene should appellant not be dismissed for failure to file a timely appeal.

that no final BLM decision had been reached until July 29, 1983. In the alternative, appellant argues that the Department should be estopped from asserting that the appeal was untimely because the delay in filing the appeal is "directly attributable" to the Department's deliberate refusal to provide documents essential to determining the validity of the challenged royalty rate. By way of analogy, appellant cites the cases of Fitzgerald v. Seamons, 553 F.2d 220 (D.C. Cir. 1977), and Richards v. Moleski, 662 F.2d 65 (D.C. Cir. 1981), which involve the waiver of statutory time limits for filing appeals until the appellant became aware of certain tortious Government conduct.

In response, BLM contends that it is unclear what BLM "decision" appellant is appealing and that it could be the notice of coal lease offering published in the Federal Register on September 21, 1978, acceptance of appellant's high bid on October 2, 1978, or the issuance of the coal lease on December 20, 1978, the date BLM executed the lease. 3/ In any case, BLM states that appellant's notice of appeal was not filed in a timely manner, i.e., within 30 days of the BLM "decision," as required by 43 CFR 4.411(a). In such circumstances, BLM argues that the Board has no jurisdiction to entertain an appeal. With respect to whether appellant's FOIA request can excuse its failure to appeal in a timely manner, BLM states:

> CSEC'S [Coastal State's] position is essentially that the issuance of a lease is not a decision, but that at any time during the lease term the lessee may decide it does not like one of the terms of the lease and then be entitled to seek information regarding that term under the FOIA and at some indeterminate point after that be entitled to file an appeal to IBLA. Such a result would be clearly in violation of the mandatory time limit language of 43 C.F.R. § 4.411.

BLM requests a dismissal of appellant's appeal.

[1] As previously noted, 43 CFR 4.411(a) requires a notice of appeal be filed "within 30 days after the person taking the appeal is served with the decision from which he is appealing." It is well established that an appeal filed after the mandatory 30-day time period does not invoke the jurisdiction of the Board and must be dismissed. Score International, 78 IBLA 142 (1983); Red Rock Golf & Recreational Association, 77 IBLA 87 (1983), and cases cited therein. As the court stated in Pressentin v. Seaton, 284 F.2d 195, 199 (D.C. Cir. 1960): "[T]he timely filing of notices of appeals is jurisdictional and cannot be extended or excused." Moreover, we stated in Ina May Collier Johnson, 72 IBLA 26, 27 (1983):

> Although the Board is generally reluctant to take any action which would preclude review of appeals on the merits, the purpose of the rule is to establish a definite time when administrative

3/ 43 CFR 3475.3 provides that the effective date of a coal lease will be the first day of the month following the date of execution by BLM unless the lessee requests that the effective date be the first day of the month in which the lease is executed. In this case the effective date of the lease was Jan. 1, 1979.

> proceedings regarding a claim are at an end, in order to protect other parties to the proceedings and the public interest, and strict adherence to the rule is required. See Browder v. Director, Illinois Department of Corrections, [434 U.S. 257, 264 (1978)] * * *.

We first address the question of whether a 30-day appeal period ran from the conclusion of the FOIA proceedings, i.e., July 29, 1983. We conclude that, while the July 29, 1983, letter to appellant marked the end of the FOIA proceedings, it did not decide a matter adverse to appellant's interests, and thus subject to appeal under 43 CFR 4.411(a). It constituted a statement of fact, i.e., that a particular document sought under FOIA could not be found. It did not constitute a decision on the matter presently under appeal, i.e., the 11.68 percent royalty rate. Indeed, a fallacy in appellant's arguments is the assumption that appeal from the July 1983 letter or from any stage of the FOIA proceedings was governed by 43 CFR 4.411(a), or that an appeal lay to this Board. Rather, FOIA requests are governed by 43 CFR Part 2, Subpart B, with a right of appeal to the Assistant Secretary--Policy, Budget, and Administration. See 43 CFR 2.17(a). Any additional appeal is to the appropriate district court. See 43 CFR 2.18(d)(1). The record supplied by appellant indicates that this procedure was followed. Moreover, if appellant remained dissatisfied after the July 1983 letter, its recourse was to the district court for enforcement of its order in Coastal States.

Appellant argues that there was not a final BLM decision until appellant had amassed all the information necessary to file an appeal from the decision. In effect, appellant equates the right to appeal with the ability to frame a statement of reasons on appeal, arguing that until it was prepared to appeal it did not have the right to appeal. This is erroneous. The right to appeal arises pursuant to 43 CFR 4.411(a) regardless of the ability to frame a statement of reasons on appeal. 4/

In a reply brief, appellant further argues that requiring an appellant to appeal prior to the time it has amassed information necessary to determine whether any terms and conditions of the lease are improper would lead to frivolous and unnecessary appeals, further burdening the Department. We disagree with this argument. It assumes that after an appellant has determined that there is no basis to proceed, the appellant would pursue an appeal rather than withdraw the appeal. Only in such circumstances would the Department incur a significant and unnecessary expense of time and effort. The mere docketing of an appeal and its withdrawal does not constitute such an expense. On the other hand, the requirement in 43 CFR 4.411(a) that notice of appeal be given within 30 days from the decision being appealed would be rendered

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4/ Unlike a civil complaint, a notice of appeal need not state a reason for the appeal. This Board has recognized "I disagree with your decision and appeal," as being sufficient notice. While 43 CFR 4.412 provides that a statement of reasons should be filed within 30 days from the date of filing the notice of appeal, additional time for filing a statement of reasons is normally granted when an appellant files a motion for additional time and shows good cause.

meaningless if the appeal period commenced only after an appellant had amassed the information deemed by him to be necessary for framing the statement of reasons. At no point could any BLM decision be considered to be final and binding upon the parties unless an appeal had been taken and an opinion rendered. Contrary to appellant's argument, the result of the interpretation proposed by appellant would lead to uncertainty and frivolous appeals rather than avoid them.

In arguing that BLM did not reach a final decision until the July 1983 letter, appellant cites the cases of State of Louisiana v. Department of Energy, 507 F. Supp. 1365 (W.D. La. 1981), and Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364 (10th Cir. 1976), which considered the question of what constitutes final agency action for purposes of judicial review. The conclusion appellant draws is that final agency action is that action which will not be the subject of further proceedings within the agency. In Ideal Basic Industries, the court held that the Board's remand of a case involving a mineral patent application for a hearing on the question of discovery of a valuable mineral deposit was not a final agency action, despite being labeled as such by the Secretary. The court stated that: "The Secretary has not yet rejected Ideal's application for a patent, and until such a rejection, or similar irreparable injury to Ideal, further judicial intervention is inappropriate." Ideal Basic Industries, Inc., supra at 1370. We, likewise, will apply the cited cases by way of analogy. However, we conclude that the FOIA proceedings which led to the disclosure of the rationale behind the terms and conditions of the coal lease did not constitute any continuation of the process of setting the terms and conditions of coal lease U-28297.

Moreover, the terms and conditions of coal lease U-28297 were specifically set forth in the detailed statement made a part of the notice of the lease sale by reference thereto in the said notice. By submitting a bid the bidder essentially agrees to be bound by the terms and conditions set forth in the notice of sale. Erie Coal & Coke Corp. v. United States, 266 U.S. 518, 520 (1925); Anadarko Production Co., 66 IBLA 174 (1982); Palmer Oil & Gas Co., 43 IBLA 115 (1979); see also Robert H. Barker, 62 IBLA 331, 334-35 (1982). As we said in Anadarko Production Co., supra at 176: "To hold otherwise * * * would violate the equal opportunity for all bidders to compete on a common basis for leases." (Emphasis added.) See generally 7 Am. Jur. 2d Auctions and Auctioneers § 14 (1980). Indeed, in Lee E. Loeffler, 33 IBLA 18 (1977), we held that a successful bidder in a competitive oil and gas lease sale was not entitled to an award of the lease because his bid had specified a different production royalty than that set in the notice of the lease sale, thereby depriving the Department of the right to create a contract by accepting the bid. In the present case, appellant's offer in the form of a bid incorporated the production royalty set in the notice of the lease sale. This offer was accepted by BLM pursuant to 43 CFR 3422.3-2. There then arose a contract between appellant and BLM in the form of a coal lease with the same terms and conditions set forth in the notice of the lease sale. 43 CFR 3422.4(a) provides that after acceptance of a high bid (and in the absence of objection by the Attorney General in accordance with 43 CFR 3422.3-4) lease forms "shall" be sent to the successful bidder, who "shall" execute them, pay the balance of the bonus bid, the first year's rental, and his share of the cost of publishing the sale notice and file a lease bond. Moreover, "[u]pon receipt of the above, the authorized officer 'shall' execute the lease."

43 CFR 3422.4(a). Failure to comply with the provisions of 43 CFR 3422.4(a) on the part of the successful bidder results in forfeiture of the bonus bid deposit. 43 CFR 3422.4(d). By participating in the lease sale, appellant accepted the terms and conditions of the proposed lease and, in return, upon acceptance of its bid was entitled, upon compliance with certain conditions, to a lease with those terms and conditions. Appellant could not be said to be adversely affected by a BLM decision where the coal lease incorporated the production royalty accepted by the appellant when it submitted its bid.

The only avenue open to challenge the production royalty set forth in the detailed statement would have been to protest the notice pursuant to 43 CFR 4.450-2 and pursue an appeal from any denial of that protest. See In re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982). If the appellant had filed a protest, and based on that protest the Department had concluded that the royalty was not appropriate, BLM could have canceled the sale, thereby opening the lease to another sale in which all prospective bidders could take advantage of the adjusted royalty. Appellant, however, did not challenge the lease sale and, thus, must be deemed to have waived its right to protest and appeal. Appellant had no right to file an appeal on August 26, 1983.

[2] Appellant argues that the Department is estopped from asserting that the 30-day appeal period commenced at any time prior to July 29, 1983, because until that time the Department had deliberately concealed information which indicated that the royalty rate for coal lease U-28297 was improper. Appellant notes that estoppel may be invoked against the Department, citing Albrechtsen v. Andrus, 570 F.2d 906 (10th Cir.), cert. denied, 439 U.S. 818 (1978); and Hunter v. Morton, 529 F.2d 645 (10th Cir. 1976). In those cases, BLM had rejected coal prospecting permit applications in part, with a stated right of appeal. The appellants appealed but, during the pendency of the appeal, the Secretary placed a moratorium on the issuance of such permits and directed that pending applications be rejected. The Board, on appeal, rejected the applications as a whole citing the Secretary's order. On appeal from the Board's decision appellants argued that the Department should be estopped from rejecting their applications based, in part, on purported incorrect advice by BLM employees that prior to the Secretary's order, appellants could not simultaneously appeal the rejection of a portion of the acreage sought in their applications and accept the remainder of the acreage. In both cases the court concluded that estoppel could not be invoked because the original BLM decisions were sufficiently clear as to the alternatives available to the appellants and that there was insufficient evidence of incorrect advice by BLM employees. The present case is analogous. Appellant's right to protest the lease sale was clearly delineated in Departmental regulations. Thus, an essential element for estoppel, ignorance of the true facts, was lacking. See United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). Moreover, there is no evidence that appellant was misled by the Department regarding its right to protest. Thus, we can find neither an "affirmative misrepresentation" nor an "affirmative concealment of a material fact" required to establish estoppel. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978).

Nevertheless, appellant contends that estoppel arises from the Department's deliberate concealment of information which would have indicated that the royalty rate was improperly set. Appellant cites two cases, Richards v.

Moleski, supra, and Fitzgerald v. Seamons, supra, which essentially held that in cases of a defendant's deliberate concealment of material facts relating to his wrongdoing, the statute of limitations on civil actions does not begin to run until the plaintiff discovers or with due diligence could have discovered the basis of the lawsuit, i.e., the cause of action itself or the defendant's involvement in that cause of action. In Richards, the statute of limitations was held not to begin to run until information acquired under FOIA notified the plaintiff of the tortious conduct committed by the defendants. These cases, however, are not analogous to the present case. In this case the challenged royalty rate was clearly set forth in the notice of the lease sale and appellant knew the royalty rate which was to be applied. Even more importantly, the doctrine enunciated in Richards and Fitzgerald, applies in the case of concealment of tortious conduct by, at least in those cases, Government officials. There is no evidence in the present case that the information withheld from appellant indicated tortious conduct by any Departmental employee. Rather, such information related to the basis for imposition of the terms and conditions in coal lease U-28297 and not the royalty. Moreover, we can distinguish Richards and Fitzgerald on the basis of the principle of common fairness. In those cases, the law permitted the plaintiff to pursue a lawsuit when he discovered or should have discovered the tortious conduct which formed the basis for the lawsuit. In such circumstances, the plaintiff did not choose to be the subject of such conduct and would otherwise have been denied a remedy at law. In contrast, in the present case, appellant could have: (1) entered into a lease with BLM under the terms and conditions specified in the notice; (2) determined that it should not submit a bid based upon the specified terms and conditions of the lease; or (3) filed a protest challenging the proposed terms and conditions, pursuant to 43 CFR 4.450-2. Moreover, we cannot attribute appellant's failure to protest the royalty rate to the Department's refusal to turn over various documents which indicated the genesis of the rate. Appellant's argument ignores the fact that it never made a request for information regarding the basis for determination of the royalty rate until "several weeks" prior to July 2, 1980, well after the 1978 notice of the lease sale. See note 1. Thus, another essential element for estoppel, reasonable reliance on the party to be estopped to the detriment of the party asserting the estoppel, was lacking. See United States v. Georgia-Pacific Co., supra at 96. Accordingly, we conclude that estoppel cannot be invoked in this case.

We conclude that the appeal is properly dismissed. Therefore, the motion to dismiss filed by BLM will be granted. We do not reach the merits of the appeal. 5/

5/ We note that appellant is not without remedy with respect to the 11.68 percent royalty rate it now considers to be onerous. The applicable regulation, 43 CFR 3473.3-2(d) (1982), provides that a lessee may apply for reduction, waiver, or suspension of royalty at anytime during the term of a coal lease. See also 30 CFR 203.200. BLM informs us on appeal that appellant filed such an application, which was rejected by the District Mining Supervisor, Minerals Management Service, by decision dated Aug. 10, 1982, and that no appeal was filed.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Gail M. Frazier
Administrative Judge